

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL REVISION APPLICATION NO. 119 OF 2002

Natesha Securities. ... Applicant.

V/s.

1. Vinayak Waman Mokashi.

2. State of Maharashtra. ... Respondents.

Shirish Gupte, senior counsel with Rajiv Patil for the applicant.

S.P.Thorat with Sandesh Deshpande for respondent No.1.

Ms.S.D.Shinde, APP for respondent No.2- State.

CORAM: V.C.DAGA, J.

DATED: 15th October 2007.

JUDGMENT :

. This revision application was heard and dismissed for the reasons to be recorded. Accordingly reasons are being recorded.

Introduction :

2. This criminal revision application filed under section 397 read with section 401 of Code of Criminal Procedure, 1973 (Cr.P.C.), is directed against the judgment and order dated 11th March, 2002 passed by

the learned Sessions Judge, Pune in Criminal Appeal No.79/2001 confirming the judgment and order dated 21st May, 2001 passed by the Judicial Magistrate, First Class, Pune in Criminal Case No.439/1997, who was pleased to convict the applicant- accused under section 138 of the Negotiable Instruments Act, 1881 ("N.I.Act" for short) for the reasons recorded therein.

Factual Matrix :

3. The factual matrix of the case, in brief, is that the applicant/ accused is one Mr.Shirish Suresh Welling, proprietor of M/s.Natesha Securities. Respondent No.1- Vinayak Waman Mokashi is one of the nearest relatives of Mr.Shirish Welling dealing in shares and securities.

4. The case of the complainant was that the accused Shirish Welling was in financial difficulties. He requested to the complainant, who happened to be one of his close relatives, for hand loan. The accused being one of the relatives of the complainant paid him Rs.1,00,000/- by demand draft No.378111, dated 22nd January, 1996 drawn on Janata Sahakari Bank payable to M/s.Natesha Securities.

5 The aforesaid demand draft was encashed by the

accused through his bank account maintained with HDFC Bank. According to the complainant, in spite of repeated demands, he did not repay the said amount to the complainant. However, after persistent demands, accused issued a cheque of Rs.1,00,000/- in favour of the complainant bearing No.012799 dated 11th November, 1996 drawn on H.D.F.C. Bank, Khar Branch Mumbai, which the applicant deposited for encashment in his bank account maintained with Cosmos Co-operative Bank Ltd. The cheque was dishonoured by the banker of the accused. The intimation of dishonour was received by the complainant through his banker on 29th April, 1997 vide bank's letter dated 25th April, 1997.

6. The complainant after receipt of intimation about the dishonour, issued notice to the accused dated 9th May, 1997 under section 138 of the N.I.Act. The applicant received the said notice on 12th May, 1997 but did not make payment within stipulated period. The complainant filed a complaint on 9th June, 1997 under section 138 of the said Act.

7. The trial Court after issuing process passed an order below Exh.1 on 8th September, 2000 and tried the case by adopting the procedure meant for summons

case. The trial Court explained the substance of accusation to the accused to which he pleaded not guilty and claimed to be tried.

8. The complainant examined himself. The accused cross-examined the complainant. The accused, thereafter, moved an application to recall the complainant for the purpose of further cross-examination to seek further clarification. Accordingly, he was allowed to cross-examine the complainant on second occasion. The complainant has also examined one of the employees of H.D.F.C. Bank, Mr. Prasad Kale. One Nitin Gokhale, employee of Janata Sahakari Bank Ltd along with one Subhash Nafad, an employee of Cosmos Bank were also examined by the complainant in support of his complaint.

9. The statements of accused came to be recorded under section 313 of Cr.P.C. on 24th November, 2000 at Exh.78. He admitted that the complainant had delivered one demand draft to the accused but, according to him, it was for the purposes of making investment in shares on his behalf. According to him, he could invest Rs.77,500/- in the shares and returned balance amount of Rs.22,500/- by demand draft drawn in

favour of the wife of the complainant. He further went on to state that the subject cheque of Rs.1,00,000/- (one lakh only) was issued just for the satisfaction of the wife of the complainant by way of security for the amount given by the complainant for investment. According to the accused, there was no financial transaction between himself and the complainant giving rise to the debtor and creditor relationship as such there was no legally enforceable debt payable by the accused to the complainant as such he was not obliged either to honour the cheque or repay the amount thereof pursuant to the notice of demand. That is how the accused has contended that section 138 of the N.I.Act had no application in the present case.

10. With the aforesaid material on record, the trial Court was pleased to hear the parties to the complaint and by its judgment and order dated 21st May, 2001 rejected all the defences raised by the accused and found him guilty of the offence punishable under section 138 of the N.I.Act and sentenced him to suffer simple imprisonment (S.I.) for a period of three months with direction to pay fine of Rs.5,000/-, in default; to suffer further S.I. for 15 days. The

accused was also directed to pay Rs.30,000/- to the complainant by way of compensation.

11. Being aggrieved by the aforesaid judgment and order dated 21st May, 2001 Criminal Appeal No.79/2001 came to be preferred before the District and Sessions Judge, Pune, who, by his reasoned judgment and order dated 11th March, 2002, was pleased to partly allow the appeal maintaining conviction of the accused under section 138 of the N.I.Act. However, the order of sentence came to be modified. So far as order directing compensation of Rs.30,000/- is concerned, the same was maintained and two months period to deposit the amount was allowed.

12. Being aggrieved by the aforesaid order of the learned Sessions Judge, Pune dated 11th March, 2002, the applicant- accused invoked the revisional jurisdiction of this court to challenge the orders of the Courts below.

Rival Submissions :

13. Mr.Gupte, learned senior counsel appearing for the applicant tried to find fault with the impugned orders and went on to urge that the complaint filed

against the applicant- M/s.Natesha Securities is not maintainable as the said firm is neither natural nor judicial person. Apart from this legal defence, Mr.Gupte filed written submissions and elaborated the same through his oral arguments considered hereinafter.

14. Mr.Gupte urged that the complainant had asked the applicant- accused to invest Rs.1,00,000/- in shares. Accordingly, applicant had invested Rs.77,500/- in shares and returned balance amount of Rs.22,500/- by drawing demand draft in favour of the wife of the complainant as such there was no legal liability against the applicant to pay the amount of the subject cheque.

15. Mr.Gupte further urged that the cheque of Rs.1,00,000/-, which was given to the complainant, was given by way of security at the time when the amount of Rs.1,00,000/-, by way of demand draft, was given to the accused and the said security was to operate till the actual investment was made. He, thus, submits that the post-dated cheque was given by way of security only. He, further submits that it was expected on the part of the complainant to return the

post-dated cheque to the applicant- accused, (which was given to him by way of security), which the complainant did not return even though the investment was made; the balance amount was returned.

16. Mr.Gupte further urged that in the evidence of the complainant it is stated by him that the applicant had asked for some loan and, therefore, he gave him demand draft of Rs.1,00,000/- by way of hand loan. If that be so, according to him, the complainant could not have filed complaint against M/s.Natesha Securities which is a business establishment with whom he had no transaction as such the complainant had no cause of action against the applicant firm to proceed under Section 138 of N.I.Act. In this submission demand draft in favour of M/s. Natesha Securities could not have been treated as personal hand loan by the complainant to the applicant.

17. Mr.Gupte further urged that there was a complete performance of the transaction between the parties which resulted in actual purchase of shares in the name of wife of the complainant, therefore, the post-dated cheque given by the applicant could not have been treated as legal liability enforceable

against the present applicant. He further went on to submit that the complainant did receive shares worth Rs.77,500/- and refund by way of demand draft in sum of Rs.22,500/-, as such accused/applicant has discharged his complete liability to the tune of Rs.1,00,000/-. As such nothing was due and payable to the complainant. According to Mr.Gupte, the complaint itself was untenable. He further submits that delivery of shares worth Rs.77,500/- in favour of the complainant, conclusively, proved that the transaction was of investment in shares. Mr.Gupte, thus, urged that both the orders passed by the Courts below are liable to be quashed and set aside being bad and illegal.

18. The submission advanced by Mr.Gupte which are part of the written submissions placed on record, were strongly opposed and refuted by learned counsel appearing for respondent No.1. He countered each and every submission made by Mr.Gupte and tried to demonstrate hollowness thereof based on material available on record. He went on to submit that the complainant has proved that the amount was given to the accused by way of hand-loan. The said amount was never returned to the complainant in spite of repeated

demands. Ultimately, the cheque for Rs.1,00,000/- was issued in discharge of the liability, which was dishonoured. The demand notice under section 138 of the N.I.Act was received by the accused, but he neither replied nor repaid amount demanded within the stipulated period. Both the Courts below after appreciation of evidence have, concurrently, held that the applicant- accused has committed an offence punishable under section 138. He further submits that looking to the length and breadth of the revisional jurisdiction of this Court it is not expected to reappreciate the evidence. He, thus, urged that the conviction as recorded by both the Courts below is liable to be maintained.

Consideration :

19. Having heard rival parties, none of the contentions advanced by Mr.Gupte, learned senior counsel for the applicant- accused, in his oral submissions as well as raised in the written submissions do not hold water. Needless to mention that by raising number of contradictory pleas the accused tried to blow hot and cold, which is not permissible in law.

20. Let me turn to the legal submission raised by Mr.Gupte leading to the maintainability of the complaint against a business establishment or concern or trade name. While considering this submission, one has to consider the mode and manner in which the accused in the complaint has been described. The details of which are as under:

"NATESHA SECURITIES, through its proprietor SHIRISH SURESH WELLING, Age 30 years, Occupation - Business, at present residing at Bhagirathi Sadan, Near BPM High School, 17th Road, Khar (West), Mumbai- 400 052."

The identical description of the applicants- accused is to be found in the present revision application. It appears from the record that name of the proprietor and the name of the business establishment has been properly shown; from which it is not difficult to find out who is the accused person. In the evidence of the complaint, in clear terms, it is admitted that Mr.Shirish Suresh Welling is the proprietor of the firm M/s.Natesha Securities. Mr.Suresh Welling, proprietor of the concern, was well aware of the fact

that he is being prosecuted as a proprietor of his firm. He was knowing the nature of the prosecution faced by him. No defence as is raised before this Court was ever raised by the applicant- accused before either of the Courts below. The status of the proprietor of the firm was clearly and properly described with full name of the proprietor. It was not only described in the cause title of the complaint but also in the body of the complaint, and evidence to that effect was tendered by the complainant.

. Mr. Shirish Welling entered in the witness box in support of his defence and stated "I am doing business of buying and selling share in the name and style 'Natesha Securities' since 1993." It is, thus, clear that the applicant- accused was well identified person facing prosecution knowing well that he is being prosecuted for his act done as an owner of the establishment- "M/s. Natesha Securities". He had accepted service of the notice together with summons issued by the Court without keeping any reservation. Under these circumstances, it is not possible to hold that the description of the accused was and is vague and he cannot be identified.

21. Mr. Shirish Welling (accused), proprietor of the firm was never charged on the concept of vicarious liability. But he was charged and prosecuted for his own act as an owner of the business. The doctrine of identification is conceptually distinct from vicarious liability. The start of any analysis as to whether or not a person is to be identified with the proprietorship firm is in the very concept which has been recognised under order 30 rule 10 of Code of Civil Procedure, 1908 which permits filing of the suit against the proprietorship concern doing business or trade in its trade name through its owner or proprietor. This provision makes applicable the provision of order 30 to the proprietorship concern, whereby one can sue the proprietor of the said business concern. Prima facie; "directing mind and will" of the proprietorship concern will be its proprietor because the proprietor being the sole owner enjoys full independence without any restriction on his power from the outside agency.

22. It is, no doubt, true that the phrase "directing mind and will" comes from the celebrated Speech of Viscount Haldane L.C. in Lennard's Carrying Co. v. Asiatic Petroleum Co. Ltd., (1915) A.C. 705,

713 while considering the case arising from the provisions of the Companies Act. But the very same concept and principle holds good for finding out criminal liability of a person carrying on trade in the trade name, if sufficient evidence in that behalf is available on record.

23. Lord Hoffmann in **Meridian Global Funds Management Asia Ltd. v. Securities Commission** (1995) 3 All ER 918, (1995) 2 AC 500 which was a case in which the chief investment officer and senior portfolio manager of an investment management company, with the company's authority but unknown to the board of directors and managing director, used funds managed by the company to acquire shares, but failed to comply with a statutory obligation to give notice of the acquisition to the Securities Commission. The trial judge held that the knowledge of the officer and manager should be attributed to the company and the Court of Appeal of New Zealand upheld the decision on the basis that the officer was the directing mind and will of the company. The Privy Council dismissed an appeal and affirmed this view.

24. In the **Attorney General's Reference (No.2 of**

1999) reported in (2000) 3 All ER 182 it was held as under:

(1) A defendant could properly be convicted of manslaughter by gross negligence in the absence of evidence of his stage of mind. Although there might be cases in which the defendant's state of mind was relevant to the jury's consideration of the grossness and criminality of his conduct, evidence of his state of mind was not a prerequisite to a conviction (see p.186 a, post); R v Adomako [1994] 3 All ER 79 considered.

(2) A non-human defendant could not be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual....."

In the aforesaid view of the matter, in my considered view, the complaint filed against the business establishment through its proprietor would be very much maintainable in the eye of law so long as the identification of human individual behind the curtain is possible without any mistake.

25. Considered from another angle, it has to be kept in mind that law relating to negotiable instrument is the law of the commercial world which was enacted to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be

convertible into money and easily passable from one person to another. In the absence of such instruments, the trade and commerce activities were likely to be adversely affected as it was not practicable for the trading community to carry on with it the bulk of the currency in force. The introduction of negotiable instruments owes its origin to the bartering system which was prevalent in the primitive society. The negotiable instruments are, in fact, the instruments of credit being convertible on account of the legality of being negotiated and thus easily passable from one hand to another. The source of Indian Law relating to such instruments is admittedly the English Common Law. The main object of the Act is to legalise the system by which instruments contemplated by it could pass from hand to hand by negotiation like any other goods. The purpose of the Act is to present an orderly and authoritative statement of the leading rules of law relating to the negotiable instruments. The Act intends to legalise the system under which claims upon mercantile instruments could be equated with ordinary goods passing from hand to hand. To achieve the objective of the Act, the Legislature in its wisdom thought it proper to make provision in the Act for conferring

such privileges to the mercantile instruments contemplated under it and provide special procedure in case the obligation under the instrument was not discharged. It has, always to be kept in mind that section 138 of the N.I.Act creates an offence and the law relating to the penal provisions has to be interpreted strictly so that no-one can ingeniously or insidiously or guilefully or strategically be prosecuted.

26. It is further to be noticed that the N.I.Act permits issuance of cheque by the proprietorship concern under the signature of its proprietor. The cheque can be issued in favour of proprietor of the concern without showing the name of the proprietor. The bank account can be opened in the name of the proprietorship concern to be operated by its proprietor. In the commercial world, the establishment and the running of business in the trade name by the proprietor is not only permissible but well recognised. If the object of the amendment to the provisions of N.I.Act, which relates to incorporation of Chapter XVII is to effect expeditious recovery of the cheque through criminal prosecution and if the complaint filed against the trade name

through its proprietor is held to be not maintainable as canvassed by Mr.Gupte, then, in my view, the very purpose of the amendment to the N.I.Act would be defeated. One fails to understand, if the suit can be filed against the proprietorship concern through its proprietor then why not the complaint under section 138 of the N.I.Act.

27. The Courts are expected to adopt the construction which "shall suppress the mischief and advance the remedy". It is a sound rule of construction of statutes that four things are to be discerned and considered, viz., (i) What was the common law before the making of the Act; (ii) What was the mischief and defect for which the common law did not provide; (iii) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and (iv) The true reason of the remedy and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief. The principle of purposive construction can also be applied to penal statutes to avoid a lacuna and to suppress the mischief and advance the remedy.

Readily available example, if to be furnished, the same can be referred to in relation to construction of section 195(3) of Cr.P.C. which reads:

In clause (b), of sub-section (1) the term court means a Civil, Revenue or Criminal Court and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a court for the purposes of this section."

The Supreme Court in **Baliram Waman Hiray (Dr.) v. Mr. Justice B. Lenin**, AIR 1988 SC 2267, p.2283 : (1988) 4 SCC 419, has pointed out that this section was enacted to implement the recommendations of the 41st report of the Law Commission which had referred to the unsatisfactory state of the law due to conflict of opinion between different High Court as to the meaning of the word court in section 195 of Cr.P.C. and had recommended that a tribunal might be regarded as a court only if declared by the Act constituting it to be a court for purposes of section 195. On this view it was held that a Commission of Inquiry constituted under the Commissions of Inquiry Act, 1952 was not a court for purposes of section 195 as it was not declared to be so under the Act.

28. Alternatively, considered from another angle,

had the complainant described Mr. Shirish Welling alone as accused, then, according to Mr. Gupte, such a complaint would be very much maintainable. If this is so, without accepting the submission made, at the most, it could be said to be a case of misdescription of the accused but nonetheless the real accused was knowing full well that he is being prosecuted for his own act and that he has defended his case with full understanding that he is an accused in the case. The applicant-accused has not suffered any prejudice because of misdescription, if any. At least, no prejudice suffered by the accused is brought to the notice of the Court. In this view of the matter, objection raised by Mr. Gupte leading to the tenability of the complaint stands overruled.

29. Now turning to the factual contentions raised by Mr. Gupte, one of which is that the amount of Rs.1,00,000/- paid by the complainant by demand draft was utilised for purchase of shares in the name of his wife. The submission has no substance for more than one reason. Firstly, there is no material in support of the factual contention raised. Secondly, evidence on record, undisputedly, prove that the draft was in

the name of M/s.Natesha Securities. Ample documentary as well as oral evidence in this behalf is available on record. The bank account of M/s.Natesha Securities maintained by its bankers H.D.F.C. Bank (Exh.65) shows credit entry evidencing receipt of the amount by M/s.Natesha Securities. It is, thus, clear that the amount was received by the accused in the name of his proprietorship concern. Thus, there is positive evidence on record to prove beyond doubt that the amount actually went to the account of the accused.

30. Another contention of Mr.Gupte that the amount of Rs.77,500/- was used for purchasing shares has no legs to stand for want of evidence on record. No evidence is on record to suggest purchase of shares muchless either in the name of the complainant or his wife. One document sought to be relied upon cannot be read in evidence for want of proof. Not a single share or details thereof are on record to show that the shares were ever purchased out of the said amount. In this view of the matter, one has to conclude that no investment was made by the accused in the name of the complainant or his wife. If the defence of having received the amount for making investment in shares is discarded, then payment of Rs.22,500/- cannot be said

to represent the refund from and out of the amount paid by the complainant by way of hand loan. There is no material on record to show why and on what account an amount of Rs.22,500/- was paid by the accused to the wife of the complainant. As a matter of fact, complainant's wife had no concern with this transaction. At least no material is available on record to connect her with the subject transaction.

31. The transactions reflected in the bank account of the applicant show heavy turnover running in lakhs of rupees. This leads me to draw an inference that the accused must be paying income-tax based on the books of account maintained in the regular course of business. In absence of books of accounts, no one can carry business in shares and securities of such heavy magnitude. No books of accounts have been produced before this Court to show any sale or purchase of shares in the name of complainant or his wife.

32. The amount paid to the wife of the complainant cannot be said to be a payment to the complainant. No material is on record to indicate as to why amount of Rs.22,500/- was paid by the accused to the wife of the complainant. At any rate, for want of evidence, which

was exclusively in the knowledge of the accused, it is not possible to conclude that refund of Rs.22,500/- had anything to do with the amount paid by the complainant to the accused.

33. The next contention advanced by Mr.Gupte is that cheque of Rs.1,00,000/- was given by way of collateral security for the amount received by the accused and that cheque was to operate as a security till actual investment was made. Let me examine the strength of this submission. The relevant dates available on record would show that on 22nd January, 1996, the complainant handed over demand draft in the sum of Rs.1,00,000/- to the accused. On 9th July, 1996, the amount of Rs.22,500/- was returned by way of demand draft drawn in favour of the wife of the complainant. On 11th November, 1996, subject cheque of Rs.1,00,000/- bearing No.012799 favouring complainant drawn on H.D.F.C. Bank was issued and given to the complainant by the accused. Thus, looking to these dates, the submission made by Mr.Gupte cannot be accepted. Had it been by way of security, then the cheque would have been issued by the accused immediately on receipt of demand draft of Rs.1,00,000/- from the complainant, which was received

by him on 22nd January, 1996. The subject cheque was given to the complainant in the month of November, 1996 i.e. after a lapse of 11 months. Secondly, if the amount of Rs.22,500/- was already returned to the wife of the complainant by the accused from and out the said amount received by him from the complainant, then the balance amount payable to the complainant was only Rs.77,500/-. In that event, in no circumstance, the cheque of Rs.1,00,000/- could have been issued by the accused in favour of the complainant by way of security because by that time, as per the version the accused himself, investment in the sum of Rs.77,500/- was already made and an amount of Rs.22,500/- was already returned. If that be so, there was no need for him to give cheque of Rs.1,00,000/- by way of security.

. Considered from another angle, if it is the defence of the accused as sought to be projected by Mr.Gupte that the accused on purchase of shares of Rs.77,500/- returned Rs.22,500/- by way of demand draft drawn in favour of the wife of the complainant and the account was squared up, then there was no occasion for the accused to issue cheque of Rs.1,00,000/- in favour of the complainant. Thus,

submission sought to be raised by Mr.Gupte in this behalf does not hold water.

34. The next contention of Mr.Gupte is that the amount was given for making investment in shares. At this juncture, it is relevant to note that whenever shares are purchased by the broker, they are purchased in the name of the customer and not in the name of the broker himself or his establishment. Had the shares been purchased, they would have been purchased by the accused in the name of the complainant. The delivery thereof would have been given to the complainant. At this juncture, it is necessary to take judicial note of the fact that in 1996, the shares used to be traded in physical form. The purchaser was required to obtain Transfer Form to get the shares transferred in his name. No such evidence is available on record to show that at any point of time shares were purchased by the accused in the name of the complainant. Assuming for the sake of argument that the shares were purchased not in the name of the complainant but in the name of proprietorship concern of the accused, then it was expected on the part of that proprietorship concern to transfer the said shares in the name of the complainant. No evidence of purchase

of shares or transfer thereof is available on record. This leads me to conclude that the complainant had paid Rs.1,00,000/- by way of hand loan to the accused and not for investment in shares.

35. The very facts that the demand draft was drawn in favour of the applicant- firm and that it was credited in the account of the applicant lead me to hold that applicant/accused was a debtor and the complainant was a creditor. The cheque of Rs.1,00,000/- was given by the accused to the complainant towards discharge of his legal liability. Thus, none of the contentions raised by Mr.Gupte can be accepted.

36. In the aforesaid backdrop, if the evidence of the complainant is examined, as examined by the Courts below, it is clear that the complainant has proved beyond doubt his legally enforceable liability as against the accused. He has also proved that in spite of receipt of notice under section 138 of N.I.Act no payment is made.

37. The revision is, therefore, without any substance. The same is liable to be dismissed.

38. At this juncture, it will be relevant to note that the trial Court has awarded compensation of Rs.30,000/- only, as against the cheque of Rs.1,00,000/- which by any standard cannot be said to be proper determination of compensation, however, it cannot be enhanced for want of proper challenge at the instance of the complainant. However, considering the fact that the complainant was dragged in litigation right from the year 1996 till this date, i.e. for ten years, in my considered view, complainant/ respondent No.1 would be entitled to costs from the applicant-accused, quantified in the sum of Rs.25,000/-.

39. With the above observations, revision application is dismissed.

40. The applicant is directed to surrender before the Judicial Magistrate, First Class, Pune within eight (8) weeks from the date of this order.

JUDGE